

Domestic Relations: The Present Law on Artificial Insemination

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The difficulty which Justice Dietrich, in his dissenting opinion in the *Willenson* case, finds is in the placement of an affirmative duty upon the attorney to make the independence of the operation apparent to the general public. He would prefer that it be incumbent upon one challenging the arrangement at least to allege that the operations are not in fact independent.¹⁵ However, it does not appear to this author that the burden placed upon the attorney is too great in light of the public interest which is to be protected.

In the *Willenson* case, the Wisconsin Supreme Court laid down definite requirements which must be observed by an attorney who wishes to engage in an independent business or share an office with a nonprofessional. Adherence to the Canons of Ethics regarding advertising is of primary importance. Further, the attorney has a duty to make an obvious physical separation of the nonlegal business from the legal business. Future conduct of the type involved in this case will not be tolerated and it is evident that the court will continue to regulate the professional conduct of attorneys very strictly.

COLLEEN A. ROACH

Domestic Relations: The Present Law on Artificial Insemination
—Few topics have engendered such great controversy in the past years as that of artificial insemination (hereinafter called AI). The social, moral,¹ religious, and legal problems raised by this relatively new medical technique defy treatment in a single article; in fact, the very interrelationship of these disciplines has so complicated this topic that a veritable paralysis has resulted in the law concerning AI. Yet, the legal profession cannot close its eyes to the serious nature of this problem. AI cannot be treated as a passing fad performed upon some insistent childless women as an experiment of sorts. Statistics on AI are at best conjecture because of the secrecy involved in its administration; however, some have estimated that approximately 100,000 American families have had children through the AI procedure and all seem to agree that its use will increase.² Thus, an examination of the present status of the law and possible future legislation on AI seems in order. It is this author's position that AI should be examined and analyzed from a public policy viewpoint, placed in the general setting of Judeo-Christian morality which prevails in our American society, yet divorced as much as possible from the detailed religious problems involved.

The method used to effect artificial insemination is of vital legal significance. There are three types of AI used by physicians to im-

¹⁵ *Id.* at 529, 123 N.W. 2d at 458.

¹ For an excellent discussion of the sociological, religious, and ethical aspects of artificial insemination see Rice, *A.I.D.—An Heir to Controversy*, 34 NOTRE DAME LAW. 510 (1959).

² Weinberger, *A Partial Solution to Legitimacy Problems Arising From the Use of Artificial Insemination*, 35 IND. L. J. 143 (1960).

pregnate a woman. When the sperm count of the husband is high enough to indicate fertility and failure to conceive is due either to the husband's physical or psychological inability to effect intercourse, or due to some structural defect in the wife's anatomy, the semen to be used will be taken from the husband. This procedure is called artificial insemination homologous (hereinafter called AIH) and is virtually free of *legal* problems.³ The only question arising under AIH is whether it is such a consummation of a marriage as to bar an action for annulment by the wife on grounds of the husband's impotency.⁴ When the sperm count of the husband indicates a low fertility potential one of two techniques are available. The sperm of a third party donor may be used exclusively. This process is known as artificial insemination heterologous (hereinafter called AID). Another alternative available is to mix the sperm of a third party known to be fertile with that of the husband and to use the resulting fluid. This technique is called combination artificial insemination (hereinafter called CAI), and even though this process has little medical significance (outside of bolstering the ego of the husband by giving him a sense of participation), it may, as will become apparent later in our discussion of legitimacy, have important legal ramifications. AID and CAI have opened a Pandora's box of legal problems because it must be assumed that the biological father is not the husband of the offspring's mother, and yet, there has been no act of illicit intercourse.

Attention, thus, must be focused on the most serious problem concerning artificial insemination—does it constitute adultery? In discussing this question, the possibility must be examined that courts might afford different treatment to adultery as a *criminal offense* and adultery as grounds for a *divorce action*. To the author's knowledge there has been no attempt to prosecute AID on grounds of criminal adultery in this country.⁵ The question of AID as adultery has, however, been raised several times in divorce actions. The first judicial pronouncement came in the case of *Orford v. Orford*.⁶ The suit dealt with the wife's demand for alimony in a divorce action; the husband basing his defense on the wife's committing adultery by AID *without* his consent. The court found that there had in fact been "real" not "artificial" adultery and in lengthy dicta pronounced AID as "a monstrous act of adultery."

³ The moral problems concerning the method of obtaining the semen from the husband is a matter to be determined by the religious authorities of the various faiths. There is a wide divergence between Catholic, Jewish, and Protestant views on the method to be used.

⁴ In 1949, an English case held that conception and birth of a child by AIH would not prevent the wife from seeking an annulment of the marriage on grounds of the husband's impotency. *R.E.L. v. E.L.* [1949]; 1 All E.R. 141.

⁵ In 1959, an Italian Court held that AID without the husband's consent constituted criminal adultery. *In re Carla Casarotti Faedda*, N.Y. Times, Feb. 17, 1959, p. 8.

⁶ 49 Ont. L.R. 15, 58 D.L.R. 251 (1921).

The court defined adultery anew in the following manner:

The essence of the offense of adultery consists, not in the moral turpitude of the act of sexual intercourse, but in the voluntary surrender to another person of the reproductive powers or faculties of the guilty person; and any submission of these powers to the service or enjoyment of any person other than the husband or the wife comes within the definition of adultery.⁷

The first American case to deal with this problem on facts similar to the *Orford* case was *Hoch v. Hoch*.⁸ There the court held that even *without* the consent of the husband AID was not adultery. Again this pronouncement was dicta because the court found that there had in fact been "real" adultery. In 1954, the Superior Court of Cook County, Illinois, in the case of *Doornbos v. Doornbos*,⁹ granted a decree of divorce on grounds of adultery declaring that AID *with or without* the husband's consent was adultery. There is no way to reconcile *Doornbos* with *Hoch*.

The difficulty in part in this area is that no court having final appellate jurisdiction has passed on the question of whether or not AID constitutes adultery. However, most authorities agree that in order to hold AID to be adultery one would have to stretch both the common law and statutory definitions of adultery beyond reason. At common law for adultery to have been committed, actual sexual intercourse must have taken place with actual penetration of the male organ into the body of the female.¹⁰ It would seem impossible to bring AID within this definition. Although adultery as a criminal offense is purely statutory, it often must fall back on the common law for the precise definition of what constitutes adultery.¹¹ In a state where the term is defined in the statutes, one element always includes "sexual intercourse," and the accepted definition of sexual intercourse again requires actual contact and penetration between the sexual organs of the male and female. The strict and narrow interpretation of criminal statutes would almost certainly preclude interpreting AID as adultery.

It seems evident that the holding of the court in the *Orford*¹² case, that the surrendering of the reproductive organs to another constitutes the crime of adultery rather than an act of moral turpitude, simply is not in line with the accepted concept of adultery. If the *Orford* definition were accepted, innumerable problems would arise. Would the third party donor as well as the wife be guilty of adultery? What would be the criminal liability of the administering physician (three party adult-

⁷ *Id.*, 58 D.L.R. 251, 258.

⁸ Unreported, Cir. Ct., Cook County, Ill. (1948); see Chicago Sun, Feb. 10, 1945, p. 13, col. 3; Time, Feb. 26, 1945, p. 58.

⁹ 23 U.S.L. WEEK 2308 p. 16 (Ill. Dec. 13, 1954).

¹⁰ 1 AM. JUR. Adultery §9, (1936).

¹¹ 1 AM. JUR. Adultery §3-4 (1936).

¹² Note 6 *supra*.

ery)? If the sperm of a donor from a sperm bank is used and the donor has died are we to say that adultery was committed with a dead man? To ask these questions is to answer them, and it becomes clear that to treat AID as criminal adultery would result in ludicrous and illogical decisions.

Although courts have held that even in divorce actions adultery must consist of actual sexual intercourse,¹³ it is possible that a liberal court might interpret AID as adultery in such a situation.¹⁴ Since no criminal prosecution is involved, the courts need not be hampered by strict construction of statutes. Furthermore, since one of the very reasons adultery is grounds for divorce is the possibility that a bastard child may be made the heir of the husband, a court might be willing to find that AID, having the same effect, is also grounds for divorce, especially when the husband has not consented to the insemination. One is thus left to conjecture as to how the courts will deal with this question, and it can only be pointed out that because the classical definition of adultery has required actual physical connection, the probabilities are against a holding of AID as adultery in both criminal and divorce actions.

Related to the problem of adultery, but not governed by its determination, is the question of the legitimacy of the child conceived through AID. To be sure, if AID is held to be adultery the child resulting is illegitimate, as we established in the *Doornbos*¹⁵ case. But, even if AID is found not to be adultery, the child may still be found to be illegitimate, since the natural father was not married to the mother before or after the conception by AID. In *Strnad v. Strnad*¹⁶ the husband was seeking visitation rights to a child born as a result of AID. The New York court held that:

- (1) the child was potentially adopted or semi-adopted by the husband,
- (2) the child was legitimate, and
- (3) the situation did not differ from the case of a child born out of wedlock, who is by law made legitimate upon the marriage of the interested parties.

This decision was seized upon by the proponents of artificial insemination as a final solution to the sensitive problem of legitimacy. The difficulty with the *Strnad* case is that it did not have a legal leg to stand on and was the attempt of a well meaning court to deal with a complex topic

¹³ *Johnson v. Johnson*, 78 N.J. Eq. 507, 80 Atl. 119 (1911); In *Russel v. Russel*, however, an English court stated in dictum that a wife who had been impregnated by a paramour (not AI), had committed adultery even if there had been no sexual intercourse. [1924] p. 61 A.M. 689, 720.

¹⁴ *Hager, Artificial Insemination: Some Practical Considerations for Effective Counseling*, 39 N.C.L. Rev. 217, 234 (1961).

¹⁵ Note 7 *supra*.

¹⁶ 190 Misc. 786, 78 N.Y.S. 2d 390 (Sup. Ct. 1948).

in a cursory and evasive fashion. The recent case of *Gursky v. Gursky*¹⁷ should lay to a final rest the fallacious reasoning of the *Strnad* case. In the *Gursky* case, the husband in a separation action refused to pay for the support of a child, conceived by his wife through AID, though he had given his consent. The court found that there was no basis in law to hold the child legitimate since the husband was not the natural father of the child. As to the theory of semi-adoption raised by the *Strnad* case, the court pointed out that adoption was a statutory procedure and that no court could "imply" adoption to meet an exigent circumstance. Finally, it seems that the comparison made between AID and the case of a child, born out of wedlock and subsequently made legitimate upon the marriage of the interested parties, is false and misleading. In the latter case the natural parents marry and the child is as a result made legitimate, but in AID the husband is not the natural parent and calling him an *interested party* in the action does not add legal significance. In *Gursky* the court did find the husband liable for support since his consent to AID was held to equitably estop him from denying support. It thus seems that in absence of legislation or formal adoption the child must be held to be illegitimate.

Heretofore, in the discussion of legitimacy it has been presumed that the child is in fact not that of the husband and is therefore illegitimate. Practically, this may be a very difficult matter to prove because of the strong presumption the courts give to the legitimacy of a child born in wedlock.¹⁸ In fact, legitimacy is often defined as the state of being born in lawful marriage,¹⁹ while illegitimacy is defined as the status of a child born of parents not legally married at the time of birth.²⁰ It seems doubtful that this presumption could be overcome by merely proving that the husband had a low fertility potential, since this would only show that it was unlikely that the husband was the natural father and not that it was impossible for him to father the child. That this possibility would seem to suffice to legitimize the child is evident from cases which hold that even if the mother had been living in open adultery with another man the child is legitimate if the husband had access to the wife at the time of gestation. In *Matter of Findlay*, Chief Justice Cardozo expressed the rule clearly:

If husband and wife are living together in the conjugal relation, legitimacy will be presumed, though the wife harbored an adulterer. . . . It may even be presumed though the spouses are living apart if there is a fair basis for the belief that at times they may have come together.²¹

¹⁷ 242 N.Y.S. 2d 406 (1963).

¹⁸ *Eldridge v. Eldridge*, 153 Fla. 873, 16 So. 2d 163 (1944).

¹⁹ 1 BLACKSTONE, COMMENTARIES 446 (Christian ed. 1878).

²⁰ *Id.* at 454.

²¹ 253 N.Y. 1, 8, 170 N.E. 471, 473 (1930).

Furthermore, one can only guess whether the courts will accept into evidence the results of sterility tests, and if they do, whether they will be held to be conclusive on the matter.²² Because of this strong presumption favoring legitimacy, one author has suggested that doctors use the CAI method and document the fact that the husband was not absolutely sterile.²³

According to the courts that find the child illegitimate the question arises—is there any way to legitimize the child? The procedure of adoption should be available to the husband but because adoption statutes do not contemplate AID they may not provide the answer. The problem arises from the fact that statutes generally provide for adoption by persons other than the parents, or by a spouse to whom one of the parents was married after the birth of the child.²⁴ In these jurisdictions it is obvious that statutory law should be modified to allow for adoption of an AID child in absence of other legislation concerning artificial insemination.

It should be pointed out that litigation on the topic of AI has been rare. This has resulted both because of the secrecy involved, and the difficulty in proving the child illegitimate due to the presumption of legitimacy previously discussed. We have no public records which indicate whether or not a child is a product of AI. To promote secrecy and save themselves harmless from prosecution for falsification of public records, many doctors who perform AID will send the patient to another doctor for the delivery of the child. Such doctor, being unaware of the method used to impregnate the woman, will thus innocently register the woman's husband as the natural father on the birth certificate.

Another problem, which grows out of the fact that there is such complete secrecy in the administration of AID, is found in the possibility of future incestuous relationships between offspring of the same biological father. Although, it is true that to some degree this problem exists in the case of adoption, it is even more aggravated in AID because the donors, as a general rule, are from a limited group (e.g. medical students are the most prolific donors), and multiple inseminations may be made from the sperm of one donor. Whether society considers this problem to be significant can only be answered by legislation on the subject.

It is the author's view that society should take a mature look at the process of AI. It will be impossible to get a unanimous stand as to its propriety because of the strongly differing religious views concerning AI. Without in any way intending to pass judgment on the differing

²² 36 TUL. L. REV. 347 (1961).

²³ Note 2 *supra*.

²⁴ It appears that WIS. STAT. §48.82 (1961) is broad enough in scope to allow for adoption of an AID child.

religious positions, it seems that nothing is to be gained by ignoring the legal aspects of AI. They should be met head on. It is probable that those who believe AID to be adultery would support legislation making it a criminal act, but the probability of this viewpoint prevailing in legislation seems dim. It would appear that the only way to deal with AID would be to legislate the symptoms and not the disease. To declare the child legitimate has the effect of declaring public policy in support of AID. The words "legitimate" and "illegitimate" have taken on moral coloration over and above their legal connotation. In the *Gursky* case,²⁵ the court solved the problem by declaring that equitable estoppel would prevent the husband from denying the responsibility of supporting the child when he consented to AID. The next logical step would be for legislatures to limit themselves in giving legitimate status to the child by stating that the responsibility of the husband to the child will be "as if the child were legitimate." This would in effect protect the child somewhat while not involving the state in sensitive moral issues to any great degree. To date all attempts to legislate on this subject have failed,²⁶ and since no great public pressure is available, one wonders if legislation will come at all. A New York City municipal code section provides for proper examination of sperm donors.²⁷ This code section has put New York City in the ridiculous position of legislating the production of illegitimate children. One can only hope that legislatures will take a definite stand on AI.

CONCLUSION

The present status of the law seems to preclude any holding that AID is adultery in either criminal or divorce proceedings. The child, if proven beyond doubt to be the product of AID is illegitimate. The rationale of the *Strnad* case seems to be clearly refuted. Legislation on AI is conspicuous by its absence and no future attempt to legislate is imminent. It is clear that should legislation be adopted the state should not adopt a particular moral or religious position but should concern itself only with the practical effects on public policy. This would protect the child and give him right similar to that of a legitimate child.

AARON D. TWERSKI

²⁵ Note 17 *supra*.

²⁶ Legislation has been introduced in New York, Virginia, Wisconsin, Indiana, Minnesota, and Ohio.

²⁷ NEW YORK CITY SANITARY CODE §112.

